BEFORE THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA

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GALLATIN COUNTY PETITION FOR RULEMAKING	))))	**ORDER OF DENIAL**

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The Gallatin County Commission, by a Petition received October 26, 2006, has requested that the Department alter the definition of "combined appropriation" contained in ARM 36.12.101(14). The current rule reads:

> "Combined appropriation" means an appropriation of water from the same source aquifer by two or more groundwater developments, that are physically manifold into the same system.

The proposed rule amends the current rule as follows:

> "Combined appropriation" requiring a permit means an appropriation ~~of water from the same source aquifer by two or more groundwater developments, that are physically manifold into the same system~~ of ground water from the same source by:
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> (a) a second or any subsequent well, drilled after [the effective date of this rule] on a tract of record in existence in [the effective date of this rule] that together with all wells on a tract of record in existence on [the effective date of this rule] that together with all wells on that tract exceed the flow rate or volume limitations of 85-2-306(3)(a), MCA; or,
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> (b) any well on a tract of record, which is created by subdivision after [the effective date of this rule] and is subject to review under Title 76, Chapter 4, MCA

(c) except that a ground water appropriation for use by livestock only is not considered to be part of a combined appropriation.

The Commission also petitions the Department to adopt the Mont. Code Ann. § 76-3-103 (16) (a) definition of "tract of record" as a regulation. That definition is as follows:
"'Tract of record' means an individual parcel of land, irrespective of ownership, that can be identified by legal description, independent of any other parcel of land, using documents on file in the records of the county clerk and recorder's office."

After extensive departmental analysis of the petition and comments received, pursuant to Mont. Admin. R. § 1-3-205, the Department denies the Commission's petition for the following reasons:

1) The proposed rule is too complex and would be too expensive to implement, requiring a monumental increase in budget and personnel. Up to **50 new employees** would have to be hired if the proposed rule were adopted. If the proposed rule were adopted without the necessary employees to implement it, the Department's processing of permit applications would virtually grind to a halt.

2) The proposed rule and its statewide application would require groundwater permits in instances where the Department is precluded by law even from processing permit applications. Under the Montana Supreme Court's April 2006 ruling in *Montana Trout Unlimited v. Montana Dept. of Natural Resources and Conservation*, 2006 MT 72, 331 Mont. 483, 133 P.3d 224, the Department is precluded from *processing* virtually all permit applications for groundwater in the Upper Missouri River Basin Closure and other similar closures. Under the proposed rule, people who own new tracts of record in closed basins who could formerly appropriate exempt groundwater with wells producing less than 35 gallons per minute could instead only appropriate groundwater through permits they could not even apply for. The total preclusion of groundwater appropriations in closed basins and on fee land within the Flathead Reservation would be beyond the Department's rulemaking authority.

Further discussion of these reasons is set forth below.

Record Evidence Considered:

Gallatin County Petition for Rulemaking

Lewis and Clark County Commission Letter in Support

Comments Received from Interested Parties
DEQ Subdivision Statistics
Water Rights Bureau Chief's analysis of the intra-departmental impact of the promulgation of the proposed rule.

Reasons for Denial:

As indicated above, there are two important reasons for the Department's denial of this petition: the logistical and financial difficulty to the Department in implementing the proposed rule, and the fact that the proposed rule would completely halt the development of any new wells on new tracts of record or subdivisions in the Upper Missouri closed basin and in other similar closed basins.

The definition of "combined appropriation" suggested by the proposed rule would require a potential appropriator to acquire a permit in two situations where a potential appropriator does not currently need to acquire a permit. The first of these situations is where that appropriator proposes to drill a second or subsequent well on a tract of land already in existence before the effective date of the rule if that second or subsequent well, combined with all of the other wells already drilled on that tract, brings total flow rate or total volume of water pumped above the statutorily exempt flow rate or volume (less than 35 gallons per minute and 10 acre-feet per year; Mont. Code Ann. § 85-2-306(3)(a). The second is where the potential appropriator proposes to drill any well on a tract of land smaller than 20 acres in size where that tract is created after the effective date of the rule. Some exemptions will still be available. However, because all tracts of land created after the effective date of the rule will require a permit application for each well, the number of permit applications, where they may still be processed, will increase dramatically, as described below.

I. The Difficulty and Cost of Implementing the Rule

A. New Permits

i. Application Process

The Department of Environmental Quality approved approximately 1,600 subdivision applications in Fiscal Year 2005. Assuming a similar number in future, the Department's permit

application load would increase 320% from approximately 500 to approximately 2,100 if each individual subdivision well required a permit application. It is probable that some of those subdivisions would choose to pursue a community water system rather than continue to use a number of individual wells, resulting in a single permit rather than many. However, the number of those subdivisions large enough to make that choice economically feasible is unknown. In addition, there will be some subdivisions that will not be large enough to finance a community water system. Although some subdivisions might combine wells and submit individual permit applications for multiple wells in future, there is no way to know how many of the 1600 subdivisions would choose to do so.

Currently, DNRC reviews about 500 permit and change applications per year using 14.5 FTEs (full time employees). To review the documentation of each application as wells as produce MEPA documentation, each FTE processes about 2 applications per month. In order to process 1,600 additional applications at the current rate, which some appropriators and practitioners already feel is not rapid enough, *staffing would need to be increased by 46.4 water rights specialists*. Water rights specialists are paid between $29,507 and $34,715.20 annually. The DNRC does not have the legislative approval nor budget for those employees.

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ii. Hearing Process

Assuming a 320% increase in applications, the number of hearings on objections to permit applications will also increase correspondingly. In 2004, 54 of 500 applications (10.8%) received objections and 27 applications (50% of those receiving objections) went to hearing. In 2005 there were 40 requests for hearing. The proportion of applications receiving objections has increased over time and there is no reason to doubt that trend will continue. Using a figure of 1,600 additional applications, the Department could expect at least an additional 112 requests for hearings per year**.** Hearing examiners handle about 2 hearings per month. Given that the Department has a total of 2.6 FTEs for hearings examiners (two full-time, one half-time and one 10% employee), hearings examiners can, at maximum efficiency, with no continuances granted, hold 62.4 hearings per year. Hearing examiner staffing would need to be increased by 4.6 FTEs to handle the additional 112 hearings at the current processing pace which many feel is already

too slow and beyond statutory decision time frames. Hearings Examiners/Attorneys are paid $46,605.83 - $57,183.33 annually.

II. Effect on new subdivision development in the Upper Missouri River Basin Closure

In the Upper Missouri River Basin, unless the proposed appropriation qualifies for one of the statutory exceptions, the Department "may not process or grant an application for a permit to appropriate water." Mont. Code Ann. § 85-2-343 (1). An application for a ground water appropriation is one of the exceptions, Mont. Code Ann. § 85-2-343 (2). Ground water is defined as "water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is *not immediately or directly connected to surface water*." 85-2-342 (2) (emphasis added). Until the Supreme Court's recent holding in *TU v. DNRC, supra*, the Department defined "immediately or directly connected to surface water" as "ground water which, when pumped at the flow rate requested in the application and during the proposed period of diversion, induces surface water infiltration." Mont. Admin. R. § 36-12-101 (33). "Induced surface water infiltration" means that water being pumped from a ground water source is pulling surface water into the cone of depression." "Cone of depression" means "a cone-shaped depression of water table or pressure surface developing around a pumping well." Mont. Admin. R. § 36-12-101 (15).

However, in *TU v. DNRC* the Supreme Court determined that the Department's definition of ground water appropriation "immediately or directly connected" to surface water should not be limited to induced surface water infiltration but should also include "prestream capture of tributary groundwater." ¶ 40. Because there may be little or no ground water in the Upper Missouri that can be shown NOT to be immediately or directly connected to surface water, it may be that virtually no ground water permit applications may be processed by the Department as a matter of law.

If all potential new subdivision ground water users in the Upper Missouri are required to apply for a permit and if, as is the case under current law, the Department may not even accept or process those applications, a Catch-22 situation arises. Potential appropriators who previously could obtain exempt water rights pursuant to Mont. Code. Ann. § 85-2-306(3)(a) must submit a

permit application that the Department may not by law even process. The net effect is that all new subdivision development, including individual, rural homes for which a community system is not an option in the Upper Missouri and other similar closed basins such as the Teton, Mont. Code Ann. §§ 85-2-329 and -330, would completely halt on the effective date of the rule. The exception would be for those tracts of land or subdivisions that could hook into an existing water system or qualify for another exception to the closure. In addition, the parameters of the "municipal use" exception to the basin closure are currently being litigated and that exemption could potentially be precluded for many appropriators.

Response to the Gallatin County Commission's Petition:

The Commission, in support of its rule making petition, makes the argument that "the current definition of 'combined appropriation' "has encouraged a proliferation of exempt wells that has had—and will continue to have—a cumulative adverse effect on senior water rights and water resources." The Commission continues, "[t]his petitioned rule amendment will stop the use of multiple, individual wells exempt from DNRC review in the development of subdivisions." [1]

The proposed definition will stop the use of new subdivision wells exempt from DNRC review but it will not necessarily stop the use of multiple wells in subdivisions. Whether subdivisions will choose to use community water systems or continue to use multiple individual wells is an unknown. The Commission's rationale seems to be that a permit application for a community water system using one or two wells will be easier to file than a permit application for multiple wells, described as the same number of points of diversion as there are wells, whether that number is 2 or 600.

Subdivisions will only go to community water systems where it is economically possible to go to a community water system and logistically preferable to file a permit application for a community water system. What number of wells makes it economically feasible and logistically

1. The Lewis and Clark County Commission submitted a letter in support of this petition, making essentially the same argument that the rule would stop subdivision use of multiple wells exempt from review and encourage community water systems. The Department's response is the same.

preferable is unknown. Whether an appropriator ultimately chooses a community water system or a number of individual wells, that appropriator must file a permit application. The net result will be a large increase in the number of permit applications annually filed with the Department as described above.

The Commission's petition emphasizes the Commission's concern over the risks it identifies to Montana's water resources posed by the considerable development occurring in areas of the State. The Commission's Petition cites the increase in number of new lots created between 1990 and 2005 (p.9). The Commission also cites a recent Idaho case in support of the position that groundwater withdrawals by many exempt wells not required to go through the permitting process has a measurable detrimental impact on "river flows and senior surface water rights." (p. 10). The Commission has raised several important concerns that can only become more compelling as Montana's population increases and competition for water use with it.

The Department is particularly conscious of the statutory mandate provided by Mont. Code Ann. § 85-1-101, subsections 1 through 5, as follows:

> (1) The general welfare of the people of Montana, in view of the state's population growth and expanding economy, requires that water resources of the state be put to optimum beneficial use and not wasted.
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> (2) The public policy of the state is to promote the conservation, development, and beneficial use of the state's water resources to secure maximum economic and social prosperity for its citizens.
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> (3) The state, in the exercise of its sovereign power, acting through the department of natural resources and conservation, shall coordinate the development and use of the water resources of the state so as to effect full utilization, conservation, and protection of its water resources.
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> (4) The development and utilization of water resources and the efficient, economic distribution thereof are vital to the people in order to protect existing uses and to assure adequate future supplies for domestic, industrial, agricultural, and other beneficial uses.
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> (5) The water resources of the state must be protected and conserved to assure adequate supplies for public recreational purposes and for the conservation of wildlife and aquatic life.

The Legislature has given the Department the responsibility of coordinating the development and the conservation of the state's water resources to the mutual benefit of both. The facts that make the Commission's Petition compelling—the marked increase in the number of new subdivisions, is the same fact that makes the proposed rule very difficult to implement. As is described above, the number of permit applications submitted to the Department would increase by an estimated 320%, from 500 to 2,100. Personnel required to handle permits at the current pace would increase steeply in positions that have yet to be approved by the Legislature, advertised, interviewed for and filled as qualified applicants come forward. That level of increase in personnel would be required simply to keep processing at its current pace. As the Commission notes, on page 12 of its Petition, many feel that that pace is already too slow.

The Commission makes a particularly poignant argument regarding increased development in the closed Upper Missouri River Basin, which the Commission identifies as a 340% increase between 2000 and 2005 (p.9). Importantly, the effect of the proposed rule in the closed Upper Missouri River Basin (representing 1/6 of the land mass of the state) diverges significantly from the effect of the proposed rule outside the Upper Missouri River Basin.

The Commission has described this proposed definition as the key to rational county water policy surrounding new subdivisions. However, the rule completely ends all new subdivision groundwater permits in the Upper Missouri River Basin Closure, treats densely populated counties with ballooning development identically to sparsely populated counties losing population, and simultaneously presents the Department with an unmanageable increase in water right permit applications in those areas of Montana where the Department may still accept applications.

On pages 12 and 13 of the Petition, the Commissioners address the formation of a Task Force to address the issue of development. That Task Force recommended that augmentation be required by the county for all subdivisions that relied upon wells exempt from the permitting process. However, it was also concluded that:

> County Commission public hearings subsequent to the Task Force recommendations revealed that the County's legal department was hesitant to

> require county-wide standards that were more strict than statewide standards, especially in an area as specialized and controversial as water management and permitting. In addition, several DNRC staff indicated that the agency would have difficulty in processing change applications for augmentation plans linked to exempt wells under DNRC's current regulatory scheme, because the exempt wells are not subject to DNRC jurisdiction. (p. 13).

It is true that the DNRC does not have jurisdiction to require exempt wells to have augmentation. A water user obtaining an exempt water right is required to file a 602 (notice of completion) with the Department to perfect their water right, and issuing a certificate of water right thereafter is a ministerial act. The Water Use Act would have to be amended to require augmentation of exempt water rights.

Responses to Comments:

Comment from John E. Bloomquist, Esq.: In support of the petition, the Gallatin County Commission asserts concern with the use of exempt wells by subdivision development in the Gallatin Valley as affecting senior surface water rights. Without supporting data or analysis, the petitioners assert that the "cumulative impacts" of exempt wells is affecting water availability for Gallatin River water users. However, the impact of the proposed rule change is state-wide, not just in Gallatin County. There is no substantive evidence or analysis to justify the proposed change in Gallatin County itself, let alone statewide. If the commissioners wish to require such services many other avenues are available under zoning, land use ordinances, and the Subdivision and Platting Act.

However, the Water Use Act and DNRC's definition of combined appropriation are not the proper vehicles to achieve their desired result. In addition, if the Commission wishes to pursue a Controlled Groundwater Area designation for Gallatin County, there is a process which exists to achieve such a result, if warranted. Simply put, the purported factual basis for the rule amendments in unwarranted. Because the proposed rule amendment would have state-wide implications, without any data or analysis to indicate any problem or concern with exempting certain wells within Montana, the petition should be denied.

The Existing ARM Definition is Consistent with 85-2-306 (3)(a) and long-standing DNRC Practice. The interpretation of "combined appropriation" from 85-2-306 (3)(a) as contained in existing rule 36.12.101 (14) is consistent with the context and language of the statute and long-standing DNRC interpretation. A "combined appropriation" from a groundwater source means there is some form of physical connection of a delivery system. If the statute was intended as petitioners assert, the legislature could have simply stated two or more wells from the same source, requires a permit. Clearly this was not the legislature's intent, nor the plain meaning of the statutory provision. The legislature has expressly and consciously exempted 35 gpm/10a.f. wells from permitting, except those which are connected and combined which exceed the

threshold. The effect of the proposed rule clearly is at odds with the legislature's decision to exempt 35 gpm/10a.f. wells from permitting. If Gallatin County wishes to change the statute, they can go to the legislature. However, DNRC should reject the proposed amendment to an agency rule which would have the effect of being inconsistent with express statutory language and clear legislative intent. Adoption of the rule as proposed would violate the express provisions of MAPA. See, M.C.A. § 2-4-305 (6). In addition, interpretation of the statutory provision by DNRC has a long-standing history both in rule and policy of the agency. Such long-standing regulatory interpretation is given substantial deference. The rule has long guided the agency and those operating in the permit arena. Again, if Gallatin County wishes to change the statute, it should approach the legislature for the result it seeks.

Although obviously aimed at subdivision development, the language and effect of the rule is much more expansive. Farmers and ranchers (or any other property owner) who drill a second or subsequent well on their property for their use (whether for facilities, employee housing, domestic use, or otherwise) would be subject to new subsection (a). In addition, more than one well which may supply livestock with water, and a house or houses of employees or family members on the farm or ranch would not be exempt. Such an impact or effect is expressly at odds with the statutory provisions of 85-2-306 when read as a whole and 85-2-306 (3)(a) specifically. Because administrative rule, which conflicts with statutory direction and statutory intent are unenforceable, the proposed rule should be rejected by DNRC.

Because of the significance of the proposed rule change, and because there is little data or analysis accompanying the petition, DNRC would be required to comply with MEPA prior to adopting the proposed change to 36.12.101 (14). At a minimum, DNRC would be required to do a statewide EA for the proposed change, and in all likelihood an EIS would be required for the proposed rule change the effects of which are likely "significant" under MEPA. The proposed rule amendment is clearly a state action triggering MEPA compliance. However, because the proposed rule should be rejected for other reasons, MEPA compliance is not necessary if DNRC properly rejects the amendment.

Because the proposed rule is at odds with statutory language, legislative intent, and long-standing DNRC rule, the proposal should be rejected. The proposed rule change, if considered for adoption, is state action which has significant impacts requiring compliance with MEPA. If considered by DNRC, the proposed rule amendment must comply with MEPA prior to adoption or implementation.

Response: The proposed rule change would apply statewide. The Department agrees with the comment that groundwater availability and cumulative impacts vary throughout Montana and that any proposed rule must take that into account its statewide effect. The Department recognizes that the Legislature has shown that it is willing to put constraints on the amount of the exemption when necessary. Upon passage of the Montana Water Use Act, a well was exempt from the permitting process if the flow rate was less than 100 gpm. As Montana's water use continued to increase, the Legislature reduced the permit exemption to 35 gpm and added the

requirement "not to exceed 10 acre-feet per year." 1991 Mont. Laws, ch.805, § 4. Therefore, as it presently stands, Montana water law requires the Department to automatically grant water rights for wells less than 35 gallons per minute (gpm) up to 10 acre-feet as long as the well is complete and the water has been put to beneficial use. Mont. Code Ann. § 85-2-306(3)(a). However, with increasing use of the exemption, and a greater understanding of the impact of exempt water rights on other groundwater and surface water resources, the Department acknowledges that groundwater use under the exemption statute and the definition of "combined appropriation" must continue to be scrutinized to be consistent with the purposes of the prior appropriation doctrine, its many codifications in the Water Use Act, and the intent of the Legislature. The first rulemaking definition of "combined appropriation" was in 1987, 1987 Mont. Admin. Register at 1560, and the second was in 1993, 1993 Mont. Admin. Register at 1335A, and further revisions may be in order.

Comment from Russ McElyea, Moonlight Basin Ranch: The DNRC has historically taken the common sense view that a "combined appropriation" is an appropriation consisting of multiple wells drilled by the same person for the same purpose and used in concert with each other. In other words, the DNRC takes action where a person has drilled multiple small wells and then joined them together. The DNRC's interpretation is well settled law and has been in place many years.

Gallatin County believes DNRC has interpreted MCA 85-2-306 incorrectly. The petition filed by Gallatin County seeks to upset many years of established precedent by changing the plain meaning of 85-2-306 (3)(a). The Montana Administrative Procedure Act prohibits rule making which has the effect of changing a statute. MCA 2-4-305 (6) states: "An adoption, amendment, or appeal of a rule is not valid or effective unless it is: a) Consistent and not in conflict with the statutes." Under the rule making changes requested by Gallatin County, the exemption created for groundwater wells by the Legislature in 85-2-306 (3)(a) will be substantially eliminated. Thus, adoption of the proposed rule would not only conflict with the legislatively mandated exemption for wells less than 35 gallons per minute, but would also violate provisions of MAPA which preclude such conflict. Gallatin County attempts to overcome this problem by suggesting that the legislative history of 85-2-306 (3)(a) is consistent with Gallatin County's requested change. A review of this legislative history shows otherwise. As an example, Ted Doney's testimony was clearly referring to irrigation wells, not exempt domestic wells. In addition, Mr. Doney was serving as a lobbyist for the Water Development Association, and his testimony at a legislative committee hearing can hardly be taken as evidence of legislative intent. If the legislature had wanted to create the rule urged by Gallatin County, it could have done so. It did not. Moreover, the record contains no evidence the legislature intended to adopt the convoluted interpretation urged by Petitioner. Nevertheless, Petitioner doggedly interprets this history to mean that wells pulling water from the same source should be deemed "combined appropriations." Such rationale quickly leads to absurd results. Unrelated owners on unrelated

pieces of property using water for unrelated purposes could be deemed "combined appropriators" under the new rules proposed by Gallatin County, simply because they had the misfortune to be in the same source. Clearly, the petitioner has not planned for the chaos its rule will create. Enormous procedural snafus will result if this rule is adopted. Will a subdivider need to get well permits for each lot? What if previously obtained permits do not work for a new lot owner? If the subdivider does not get a well, do all the new owners need to file a combined application? What if they do not want to file together, or wish to build at different times? None of these questions are answered by Petitioner. More importantly, the materials accompanying the petition do not contain any evidence of impacts on surface water arising from usage of exempt wells. This omission is significant given that the ostensible purpose of the rule is to protect surface water rights. The only evidence of impacts to surface water contained in the materials supporting the petition is a footnote referencing a conversation between Laura Ziemer, an attorney for Trout Unlimited, and Dave Pruitt, a former Water Commissioner on the Gallatin River. It is not clear whether Pruitt was concerned about exempt wells for domestic use, or larger irrigation wells. Thus, Gallatin County appears to be basing its requests entirely on an ambiguous conversation between a former water commissioner and an attorney for a local environmental organization. According to persons serving on the Gallatin County Task Force, Laura Ziemer also helped author the petition. This means the author of the petition is supplying the only "evidence" of its need. This "evidence" is so unreliable it would be rejected as inadmissible hearsay in a court proceeding. Strong factual and scientific support is needed before implementing a rule change of this magnitude. Unfortunately, there is no scientific evidence accompanying the petition and no evidence whatsoever that exempt wells are pumping groundwater faster than groundwater is being recharged, or having any discernable effect on flows in the Gallatin River, or upon any surface water users, therein. The petition contains no analysis of the impacts of projected future growth on ground or surface water, nor does it examine the addition of water to the area caused by retirement of irrigation rights. Gallatin County tries to overcome these deficiencies by providing spreadsheets showing total lots created by county, and a second spreadsheet showing the ratio of individual wells to lots approved in 2005. Without any supporting data whatsoever, Gallatin County boldly asserts: "This data helps reveal the magnitude of the cumulative impact of exempt wells." Nothing could be further from the truth. In fact, there is not a shred of evidence which shows the impact of exempt wells upon either surface or ground water supplies. As part of its basis for requesting the rule change, Gallatin County cites an Idaho decision regarding groundwater usage in the Snake River Basin. Gallatin County claims this case: "Suggests where the future could lie for Montana and the cumulative impact of individual, domestic rules on senior water rights." This case, titled American Falls Reservoir District #2 v. The Idaho Department of Water Resources was concerned with the failure of Idaho's Department of Water Resources to make domestic water rights subject to a call by senior users. Under Idaho law, "A delivery call shall not be effective against any groundwater right use for domestic purposes regardless of priority date." IDAPA 37.03.11.020.11. The Idaho court rightly concluded that such a provision prohibited senior users from making a call on junior users. Fortunately, such a situation does not exist in Montana where exempt water rights are, and always have been, subject to a call by senior water users. Gallatin County's reliance on an Idaho court case is entirely misplaced because the law in Idaho is different than the law in Montana. Citation to this case is improper, and confuses, rather than clarifies issues regarding administration of exempt water rights in Montana. Gallatin County fails to mention that DNRC has already considered, and rejected, the creation of a controlled groundwater management area

in the Four Corners area to address precisely the issues raised in its petition. During a hearing on a petition to create the Four Corners controlled groundwater management area, numerous expert and lay witnesses testified both in favor and against the creation of a controlled groundwater management area. Ultimately, DNRC concluded there was insufficient evidence to warrant creation of a controlled groundwater management area. This ruling was based on DNRC's conclusion there was no evidence of a threat to groundwater. The evidence provided by Petitioner in its requested rule change is far weaker than the evidence upon which DNRC based its ruling. Despite this result, consideration of a controlled groundwater management area is a far narrower, far more rigorous, and therefore more desirable method of attenuating potential conflict between groundwater users and surface water users, than adoption of a statewide rule which will adversely affect tens of thousands of water users without adequate scientific evidence. Although Petitioner would like to create the opposite impression, there is no history of conflict between domestic groundwater users in Gallatin County and other water users. If there was such conflict, it would be reasonable to expect numerous objections by surface water users against groundwater development, and numerous calls by surface water users against junior groundwater rights. The record shows otherwise. According to the DNRC, there have been only five objections against groundwater applications in Gallatin County during the last twenty years (Proposal for Decision in the Matter of Petition for Establishment of Controlled Groundwater Management Area No. 30011241). In addition, there have been no calls by surface water users against junior groundwater users in Gallatin County. Id. The best vehicle for addressing the issues raised by Gallatin County is to first determine whether a problem actually exists using science rather than unsubstantiated speculation. If the problems claimed by Gallatin County are proven to exist, then a Controlled Groundwater Management Area could be thoughtfully tailored to address them rather than needlessly burdening every water user in the state with an unnecessary rule.

Response: Please see first response to comments. Further, the first rulemaking definition of "combined appropriation" was in 1987, 1987 Mont. Admin. Register at 1560, and the second was in 1993, 1993 Mont. Admin. Register at 1335A, and further revisions may be in order.

Comment from Dave Schmidt, Water Right Solutions: The amendment adopts a "one size fits all" approach to individual wells. According to the transmittal letter accompanying the petition, the petition resulted from a lengthy public process conducted by the Gallatin Water Resources Task Force. However, Gallatin County is only one of 56 counties in the state, and most of those other counties are not experiencing the explosive population growth of Gallatin County. The proposal seeks to solve a problem that just does not exist in most of Montana. In addition, the aquifers in different areas have different characteristics. Therefore, the effect of drilling exempt wells in Gallatin County may be different from the effects of the same withdrawal of water in Cascade County or Phillips County.

The proposal is premature. The Legislative Session begins in January and at least 5 bills have been requested that contemplate changes to water appropriation laws. Statutory changes may render the proposed rule unnecessary, moot or void. Major changes to the Montana Water Use Act may require a comprehensive overhaul of the rules promulgated under the Act. A piecemeal

amendment of the rules is not in the best interest of anyone concerned about the distribution of Montana's limited water resources.

In addition, please note that the petition misinterprets the legislative intent of the Montana Water Use Act. As quoted in the petition, Mr. Doney said that a combined appropriation meant "two wells that were irrigating the same tract but not physically connected." (Emphasis added.) As stated in the cover letter, the purpose of the petition is to address individual wells that are exempt from DNRC review and the subdivision process, i.e. domestic wells. Irrigation consumes more water than domestic use, so Mr. Doney's comments are not applicable to the subject of the petition.

Response: Please see first response to comments.

Comment from Ed Hudson, MT Association of Realtors: On behalf of the more than 4,600 members of the Montana Association of REALTORS, I would like to urge the Montana Department of Natural Resources and Conservation to reject the Gallatin County Commission's (Commission) petition to amend rules pertaining to the use of exempt ground water wells by development by changing the current definition of "combined appropriation." The rule change will, in effect, eliminate the use of exempt wells throughout the state of Montana. In our view, the petition ignores local authority to regulate land use. It also ignores water science, local economic interests, and property rights. Our primary concern with the Commission's petition is that it will establish a one-size-fits-all regulatory framework for the use of the domestic ground water well exemption throughout the state. Local governments have the authority to regulate land use as it relates to the availability of water (MCA 76-3-501). Nonetheless, the Commission's recommended solution to what it perceives as water availability problems assumes that the circumstances that exist in Gallatin County exist in every county in Montana. What may be a problem in Gallatin County may not be a problem in Flathead County. If the rule is adopted, the Commission effectively eliminates that statutorily granted option for other localities throughout the state.

The Commission also ignores fundamental problems with the water rights permitting process. Currently, it can take a development up to five years to obtain a permit for a community water system. Furthermore, subdivisions are often blocked by interests that use the water rights permitting process to object to the subdivision, not to address water availability issues. The elimination of the exemption would only exacerbate this problem by making more developments susceptible to these frivolous objections. Moreover, requiring nearly every development to go into the permitting process to obtain water rights would place an increased administrative burden on the reviewing agency, which would likely make the permitting process even longer and more costly. Although some attention has been given to reform, the extant permitting process is unacceptably time-consuming and costly. Any changes to Montana's water use policies should be coupled by permitting process reforms, a fact ignored by the petition.

We also believe that the Commission's petition ignores the complexities of water science. One must accept the premise that surface water and ground water are always and everywhere interconnected to consider the petition good water policy for Montana. Many hydrologists agree that the science of hydrology is far too complex to arrive at the presumption of interconnectivity.

Hydrologic connection between an aquifer and surface water depends on many factors, including the direction of ground water recharge flows, the location of the surface water to the well, and the location of the surface water to the aquifer tapped by the well. Should one presume that, for example, a domestic ground water well a mile or two from a stream or river is capturing water that would otherwise charge to the surface water? What if the well taps into a confined aquifer? The Commission makes a presumption of interconnectivity, and if the petition is successful every county in the state will have to abide by that presumption. Again, this illustrates the petition's one-size-fits-all approach. When considering this petition, we believe the effects on the housing market and the general economy in Montana should not be ignored. If successful the petition would make development outside of urban areas more difficult and costly. Tightening the supply of housing in these areas will, as simple economics dictates, drive up the price of housing. This price inflation is compounded by the costliness of the permitting process. The effect on the housing market, one of the bright spots in Montana's economy, will have a negative effect on Montana's aggregate economy. The lack of affordable or attainable housing will deter investors who may want to move their businesses to Montana when they determine that their wages are not commensurate with the cost of housing. Even a seemingly minor change in water law could disrupt this economic engine. Policymakers understood that given the minimal impact of domestic use, overregulation of that use would lead to negative effects on the housing market and general economy. This petition if successful will constitute a fundamental change in Montana's water law by effectively eliminating the statutory exemption for domestic groundwater wells. It is more suitable to have the Legislature consider such a fundamental policy change. The legislative process has much more flexibility to address the gamut of issues often associated with interrelationship of water use and land use.

Response: Please see first response to comments. Further, with the inception of the application correct and complete rules, the Department has made significant improvement in permit processing times. Upon receipt of a permit application the Department prepares a deficiency letter within 30 days of receipt. Upon publication, if no objections are received, the Department will grant or deny an application within 15 days of the objection deadline. The Department recently increased the number of hearing examiners which has allowed a hearing date to be set in 9 months rather than 18 months. The Department will continue to evaluate and improve the efficiency of its hearings process and explore whether more personnel are needed and can be funded to speed up the hearing process.

Comment from John Camden, Rural Water Systems, Inc.: 1) The rule is for new subdivisions only, and if the rule change passes it should have no effect on existing municipalities, water districts and associations, and other small Public Water Supply systems for obtaining new sources and water rights when necessary, is this correct?
2) If the rule change passes, would it allow cities and towns to purchase the water rights if they annex the subdivision?
3) If the rule change passes, will DNRC be able to handle the review and permitting of these

sources in a timely matter?
4) Is there a greater economic impact to a subdivision if it is made to become a regulated pubic water supply and waste water system?
I feel that it is very important that DNRC address the issues of rapid growth, cumulative impacts of individual wells, Senior Water Rights, and determine what is right for the growth of new subdivisions now and into the future.

Response: In response to Question No. 1, the proposed new rule would be applied to all applicable new groundwater developments and is not meant to have any effect on existing water rights associated with municipalities, etc. In response to Question No. 2, the Department declines to offer an opinion other than to say it does not see the proposed rule as intending to have that effect. In regard to Question No. 3, the Department is concerned about the increase in permit applications. The volume of new permits will substantially increase and the processing time is far greater for permits and much more complex than the ministerial actions required for wells filed under the current exception. The Department does not know the answer to Question No. 4.

Comment from Board of Lake County Commissioners: While this commission recognizes the intent to better manage and appropriate water resources, it must oppose the rule change in its current form.

The basis for our opposition is the profound impact this rule change would have on development in areas of Lake County within the boundaries of the Flathead Indian Reservation. The Montana Supreme Court has ruled that ground water permits cannot be issued on the reservation until water rights have been adjudicated. The proposed rule change will bring most subdivision projects under the permitting requirement which could halt development in much of Lake County.

The Lake County Growth Policy is designed to guide and facilitate future development in ways that limit the negative impacts of growth. In order to implement the growth policy, Lake County has adopted the Lake County Density Map and Regulations. These regulations prescribe countywide density rules that seek to create dense development around population centers where public services are available. Outside the population centers, the regulations encourage denser subdivisions with small, manageable lots and a required land set aside to promote open space. The regulations have been designed to protect the important wildlife habitat, water quality, agricultural, and natural resources of Lake County. The proposed rule change will bring many subdivision projects under the ground water permit requirement and may discourage the type of directed growth our community planning tools seek to create.

Legislation, LC0219, is being proposed that addresses the same ground water exemption issue. This commission recommends that, rather than making rule changes at this time, the matter be

relegated to the legislature for broader public discussion of benefits and impacts.

Response: Please see first response to comments. We recognize as a result of recent court cases the Department is prohibited from processing permit applications and any proposed rule would have to be sensitive to that situation.

Comments from Tim Davis, Montana Smart Growth Coalition: One of DNRC's most sacred duties is to protect senior water rights and water resources in the state of Montana. Unfortunately, DNRC's rules, specifically, the definition of "combined appropriation under ARM § 36.12.101(14), actually undermines senior water rights and water resources by creating an incentive for new development to steal water from senior water rights holders.

Gallatin County's proposed rule amendments would enable DNRC to once again carry out its duty to protect senior water rights and water resources in Montana.

Current law under MCA 85-2-306 and the legislative intent behind that law support this rule change. We believe that the current definition of "combined appropriation," under ARM § 36.12.101(14), violates both the letter and legislative intent behind the law. The law, when passed, was not intended to require a developer to have to "physically manifold together" two or more wells together in order to go through DNRC permitting.

Legislative intent and the law, on its face, clearly require that two water developments, from wells or springs, from the same source (i.e., meaning water source) must go through DNRC permitting. The proposed rule amendment would bring the rules in line with legislative intent and the letter of the law.

The current definition of "combined appropriation" under ARM § 36.12.101(14) creates manifestly absurd results. For example:

> The current definition of "combined appropriation" would allow 1,000 new wells as part of a 1,000 lot subdivision to escape review under DNRC permitting, but that same rule would require a developer putting in two homes on the same well to go through full DNRC permitting. In other words, the current rules would allow up to 10,000 acre feet a year of water to be potentially stolen from senior water rights holders neighboring or near the new 1,000 lot subdivision.

Therefore, we feel that it is essential that DNRC amend the definition of "combined appropriation" under ARM § 36.12.101(14) to read:

ARM § 36.12.101(14) "Combined appropriation" requiring a permit means ~~an appropriation of water from the same source aquifer by two or more groundwater developments, that are physically manifold into the same system.~~ an appropriation of ground water from the same source by:

(a) a second or any subsequent well, drilled after [the effective date of this rule], on a tract of record in existence on [the effective date of this rule] that together with all wells on that tract exceed the flow rate or volume limitations of 85-2-306(3)(a), MCA; or,

(b) any well on a tract of record, which is created by subdivision after [the effective date of this rule] and is subject to review under Title 76, Chapter 4, MCA;

(c) except that a ground water appropriation for use by livestock only is not considered to be part of a combined appropriation.

If DNRC is to take its duty to protect Montana's senior water rights holders and Montana's water resources seriously then DNRC must act to redefine the definition of "combined appropriation" under ARM § 36.12.101(14) to make it consistent with the letter and the intent of the law.

Response: Please see first response to comments.

Comments from Matt Clifford, Clark Fork Coalition: Following are the comments of the Clark Fork Coalition on the petition for rulemaking filed by Gallatin County to amend ARM 36.12.101, DNRC's rule regarding so-called "exempt" wells-i.e., wells that are granted water right certificates without the applicant having to go through the water right process to prove the new use will not adversely affect existing water rights holders. The coalition is a Montana non-profit corporation with approximately 1,300 members, and is dedicated to preserving and restoring the health of the ecosystems of the Clark Fork watershed and the human communities that rely on them. In addition, the Coalition has an ownership interest in the Dry cottonwood Ranch, a working ranch with approximately 130 head of cattle near Galen, Montana. As such, we hold a number of senior water rights on the Clark Fork River, Dry Cottonwood Creek, and Lost Creek, which we use both for stock watering and to irrigate approximately 80 acres of alfalfa, additional wild hay ground and a small oat crop.

We strongly support Gallatin County's petition, which we believe is long overdue. While we are not interested in pointing fingers or attempting to ascribe blame for the current situation, it is a simple fact that the current development in western Montana over the past two decades, have created a very large class of water users who are appropriating a huge volume of water outside the permit system that is supposed to protect senior rights holders. It is possible that in 1973, when residential development was proceeding at a much slower rate, there was a rational basis for exempting these users from the rules that apply to everyone else. Certainly any such basis has long since disappeared. It is simply impossible to say, as could be said in 1973, when the amount of water being developed via exempt residential wells is insignificant or is not affecting the amount of water available to senior users.

We are quite concerned for the security of our Dry Cottonwood water rights. Although the Deer Lodge Valley has historically been insulated from the increased growth that has occurred in other parts of the state, in the past decade or so, the area adjacent to our ranch has already seen an increase in homes with individual wells. Moreover, with the coming cleanup and restoration of the Clark Fork River and surrounding area under the federal and state Superfund programs, the rate of development is expected to greatly increases as the fishery and other natural amenities are

restored. The drilling of thousands of individual exempt wells into the alluvial aquifers that feed the Clark Fork is certain to adversely affect flows in that already chronically de-watered river, as has occurred in sections of the Flathead and Gallatin Valleys. As the Department is aware, the upper Clark Fork is already over-appropriated and is now a closed basin. We do not believe there is any legitimate reason to continue to exempt such a large class of users from the basin closure via an outdated loophole.

We are aware that discontinuing the permit exemption for major subdivisions will increase the workload and budgetary requirements of DNRC. That is unfortunate. But simply put, managing that state's water resources and protecting existing water rights holders is the Department's job. We do not believe it would be appropriate for the Department to knowingly decline to manage such a large volume of the water under its jurisdiction, simply because it does not have the time or money to do so. If the Department enacts the proposed rule, we will do everything in our power to help it secure appropriate funding from the legislature to handle the additional workload. But as we see it, continuing to turn a blind eye to the problem is not an option.

Finally, we would point out that enacting the rule would not mean an end to residential development-indeed; we seriously doubt Gallatin County would have proposed the rule if that were the case. Rather, what the rule would do is required that before development takes place, the developer identify and secure a source of the water that will be used-the exact same burden that applies to virtually every other class of water user. This can be done-and indeed is already being done-through mitigation plans involving the transfer of water from existing rights holder. Of course, such mitigation plans are not always simple or inexpensive. But the costs are small in relation to the overall cost of development, and more importantly, it is only fair that these costs be borne by the people benefiting from the development and not by senior water users as is presently the case. In closing, we urge the Department to adopt the proposed rule

Response: Please see Response to Gallatin County Commissioner's Petition at pp. 6-9. The proposed rule would significantly increase the permit application workload. The Department appreciates the willingness of the commenter to support additional funding and staff.

Comments from MT Dept of Fish, Wildlife and Parks: Thank you for your invitation to comment on Gallatin County's Petition for Rulemaking for Exempt Wells. Montana Fish, Wildlife and Parks (FWP) shares Gallatin County's concern with the use of multiple exempt wells in subdivisions. Development of groundwater for subdivisions without the careful consideration of impacts to surface water afforded by DNRC's permitting process is adversely affecting FWP's instream water rights. We also agree with the County that ARM 36.12.101(14) should be changed. The existing rule undermines the meaning of Section 85-2-306(3) (a) which makes clear that the permit exemption does not apply if combined appropriations from the same source exceed the 35 gpm/10 a.f. maximum.

FWP feels that proposed rule amendments submitted by Gallatin County provide one avenue to address this issue and we commend the county's initiative in submitting the Petition. However, we do have some concerns with the proposed rule.

First, the proposed rule amendments seem to contemplate that the place of use and point of

diversion for exempt wells always lie in the same tract of land. This is not always true and may present some implementation problems. As properties have been subdivided, wells serving one tract of land are sometimes located on a separate tract of land. Under the proposed rule amendments, the owner of an existing tract of land with a well but no right to use water would not be eligible to file an exempt right on a new well. This circumstance may unfairly limit water development on existing tracts. The proposed rules should consider the place of use as well as the point of diversion.

Second, a lack of a definition of the "same source" of water may also lead to implementation problems. ARM 36.12.101(60) & (61) are of little help in defining "source". The somewhat ambiguous term "same source" may prompt developers and landowners to maneuver to avoid the limitations envisioned by this rulemaking effort. It is far from clear just what would constitute separate sources of water. Would a thin lens of clay in an alluvial aquifer be sufficient or would clearly separate and unique geologic strata be necessary? Perhaps the word "aquifer" should replace "source" in the proposed rule amendments and a robust definition of "aquifer" should be added.

Third, FWP feels that it would be helpful to define "tract of land" or reference existing definitions in the rule. If Petitioners intend that the definition 76-3-103(16) (a) MCA should be used then the rule should say so.

Similarly, the term subdivision is not defined by rule. Title 76 has two definitions of subdivision, one in 76-3-104 and another in 76-4-103. The petition language references Chapter 4 of title 76 but does not specifically define subdivision. Again, this is likely to create confusion and DNRC should consider adopting one of the two definitions: Implementation of the rule and tracking for compliance will be affected by choice of which definition to use. Using the definition of Chapter 4 would limit the use of the exemption to new subdivision lots 20 acres in size or smaller. It could also provide an opportunity for coordination with the Department of Environmental Quality and opportunities to monitor implementation and enforcement. Use of the Chapter 3 definition could require water right permits on wells drilled on lots smaller than 160 acres that cannot be described as an aliquot part of a section.

Finally, DNRC should consider formalizing coordination and monitoring of the proposed rule's implementation by developing an MOU or other agreement with the Department of Environmental Quality, which administers Title 73 Chapter 3.

FWP believes that small-scale and discrete ground water development should be allowed, as envisioned by Section 306, where the impact is minimal. Unfortunately, the size and number of lots in today's subdivisions, coupled with the use of section 306 for subdivisions' water supply is having negative and cumulative impacts on the water sources upon which Montana's fisheries rely and on instream flow rights (both reservations and Murphy rights) that are held in trust for the benefit of all Montanans.

Response: Please see first response to comments. The commenter raises good issues that need to be addressed. The first rulemaking definition of "combined appropriation" was in 1987, 1987

Mont. Admin. Register at 1560, and the second was in 1993, 1993 Mont. Admin. Register at 1335A, and further revisions may be in order.

Comment from Citizens for a Better Flathead and Randy Hafer of High Plains Architects: One of DNRC sacred duty is to protect senior water rights and water resources in the state of Montana. Unfortunately, DNRC's rules, specifically, the definition or "combined appropriation under ARM 8 3 6.1 2.1 0 1 (1 4). actually undermines senior water rights and water resources by creating an incentive for new development to steal water from senior water rights holders.

Gallatin County ‘s proposed rule amendments would enable DNRC to once again carry out its duty to protect senior water rights and water resources in Montana.

Current law MCA 85-2-306 and legislative intent behind that law support this rule change... We believe that the current definition of "combined appropriation," under ARM 36.12.101 (14), violates both the letter and legislative intent behind the law. The law, when passed was not intended to require a developer to have to “physically manifold together” two or more wells together in order to go through DNRC permitting.

Legislative intent and the law, on its face, clearly require that two water developments, from wells and springs, from the same source (i.e., meaning water source) must go through DNRC permitting.

The proposed rule amendment would bring the rules in line with legislative intent and the letter of the law.

The current definition of “combined appropriation” under ARM 36.12.101(14) creates manifestly absurd results. For example: The current definition of "combined appropriation” would allow 1.000 new wells as part of a 1,000 lot subdivision to escape review under DNRC permitting, but that same rule would require a developer putting in two homes on the same well to go through DNRC permitting. In other words, the current rules would allow up to 10,000 acre-feet a year of water to be potentially stolen from senior water rights holders neighboring or near the new 1,000 lot subdivision.

Response: Please see first response to comments.

Comment from Willis Weight: I am of the opinion that this is a well thought-out and referenced document. It addresses the manifold well "combined appropriation" issue and moves forward some ideas for consideration at the state level for the up and coming legislative session, including augmentation, which must surely be implemented or the state will become disastrously over appropriated. The rate of growth in Montana must be balanced by appropriate planning and the protection of existing rights.

Response: Please see first response to comments.

Comment from Eloise Kendy: I agree that the proposed rule change is very much needed.

However, I suggest deleting "from the same source" from the language. All wells tap the same source, which is ground water. By deleting "from the same source", the Department will avoid future controversies over the definition of "source". For example, it is conceivable that a developer would drill wells to different depths within a semi-confined aquifer and claim that each well taps a different source. By deleting "from the same source", the intent of the rule change is more likely to be followed in practice than if the phrase remains in the rule.

Response: Please see first response to comments. The phrase you suggest be deleted is in statute, MCA 85-2-306(3), thus cannot be removed by rule.

Comment from Megan Estep, US Fish & Wildlife Service: The U.S. Fish and Wildlife Service supports the proposed amendment of the DNRC's definition of "combined appropriation" and "tract of record". We believe that the proposed amendment reflects the intent of the permitting process, which is to protect senior surface water right holders and surface water resources.

Response: Please see first response to comments.

Comment from Bonnie Stag, MDOT: The Montana Department of Transportation would like to make the following comment to the Petition for Rulemaking for Exempt Wells. In Section 2, Proposed Rule Amendments, we would add a new 2 (d) to read as follows: (d) except that a ground water appropriation to conduct response actions related to natural resource restoration required as aquatic resources mitigation activities done in compliance with and as required by the federal clean water act of 1977 (33 USC 5 125 1 - 1376) is not considered to be part of a combined appropriation. The wetland restoration program mandated by section 404 requires the replacement of wetlands for those filled in by the state's highway program. As a result, there is little or no additional use of water as these projects are required to balance impacts with mitigation. Also, the Army Corps of Engineers is requiring that the water for the wetlands be protected "in perpetuity"; MDT in almost all instances must secure a protectable right for the water. Typically, MDT will use existing water rights by filing for a change of use rather than acquiring new water rights; therefore the exception as stated above in 2 (d) would be used minimally.

Response: Theses comments are outside of the scope of the proposed rule change, therefore the Department will not take any action on the requested changes.

Conclusion:

For the foregoing reasons, the Department denies the Gallatin County Commission's Petition to adopt the definitions of "combined appropriation" and "tract of record" set forth above and repeal the Department's present definition. The Department appreciates the pressing concerns raised by the Commission in its Petition, and thanks the Commission and its supporters for their

time and efforts in proposing changes to the existing rule. The proposed rule, however, is simply too complex and would be too expensive to implement

Although the Department will not begin rulemaking using the text of the Commission's proposed rule[2], the Department may propose rulemaking after the first of the year that would attempt to address many of the concerns of the Commission. The first rulemaking definition of "combined appropriation" was in 1987, 1987 Mont. Admin. Register at 1560, and the second was in 1993, 1993 Mont. Admin. Register at 1335A, and further revisions may be in order. A possible change to the definition of "combined appropriation" could be as follows:

> "Combined appropriation" means a ground water appropriation on a tract of land created after [the effective date of this act] where that tract is created by a division of land creating six or more lots.

This potential rule change would not be so complex or far-reaching and the Department could perhaps administratively implement it with a modestly increased budget. Such a proposed rule would not totally foreclose groundwater development in closed basins, but it would be a positive step in attempting to address some the concerns alleged to be present in the current Department definition of "combined appropriation." Any such proposed rule change would proceed according to the rulemaking provisions of the Montana Administrative Procedures Act. Mont. Code Ann. §§ 2-4-101 *et seq*.

Dated this 22nd day of December 2006.

Terri McLaughlin, Chief
DNRC Water Rights Bureau

2. Mont. Code Ann. § 2-4-315.